

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.2727 OF 2018

Indrajit Shankarrao Nageshkar

....Petitioner

Versus

1. The State of Maharashtra, &

2. Samit Jaising Nageshkar.

.... Respondents

.....

Mr. Shirish Gupte, Senior Advocate a/w. Tejas Hilage, Supriya Kak, Karl Rustomkhan, for the Petitioner.

Smt. M.R. Tidke, APP, for the Respondent No.1-State.

Mr. Venkatesh Dhond, Senior Advocate i/b. Kuldeep S. Patil, for the Respondent No.2.

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CORAM : SARANG V. KOTWAL, J.

DATE : 22nd SEPTEMBER, 2022

ORAL JUDGMENT :

1. This is a Writ Petition challenging the order dated 16.3.2018 passed in Criminal Revision Application No.70/2017 by the Additional Sessions Judge, Kolhapur. The petitioner was the original accused No.1 in Regular Criminal Case No.480/2016 on the file of the Chief Judicial Magistrate, Kolhapur. The petitioner had filed an application for discharge under Section 239 of Cr.P.C.

from that case. The allegations against him were commission of offences punishable under Sections 406, 418 and 420 read with 34 of IPC. Learned Chief Judicial Magistrate, Kolhapur vide his order dated 29.3.2017 had allowed that application and had discharged the petitioner from the case. Respondent No.2, who was the original complainant, challenged that order before the Sessions Court at Kolhapur. That Revision Application was allowed. The order passed by the Chief Judicial Magistrate, Kolhapur was set aside and, therefore, now the petitioner is facing the trial. He has challenged the order passed in Criminal Revision Application No.70/2017 passed by the Additional Sessions Judge, Kolhapur, as mentioned earlier.

2. Heard Shri Shirish Gupte, learned Senior Counsel for the petitioner, Smt. M.R. Tidke, learned APP for the respondent No.1-State and Shri Venkatesh Dhond, learned Senior Counsel for the respondent No.2.

3. The complaint was lodged by the respondent No.2 herein. For the sake of convenience, it is clarified that the respondent No.2 and the petitioner would be referred to by their

status in the present Writ Petition. The respondent No.2 is the original complainant and the petitioner is the original accused No.1.

4. The respondent No.2 had filed the complaint praying for order under Section 156(3) of Cr.P.C. The allegations, in brief, in the complaint are as follows :

- i. The respondent No.2 is having a business of hotel and he is Director of Nageshkar Memorial Hotel Management Institute. On 24.4.1990, the respondent No.2 through his father as his guardian along with the petitioner, Swapna Kulkarni, K. Madhavrao and Asha Golwalkar purchased a land at village Kandalgaon, Taluka-Karveer, District-Kolhapur at R.S. No.14, Hissa No.13B admeasuring 25 Ares from one Satish Pawar. At the time of execution of the sale deed, the respondent No.2 was a minor and, therefore, the documents were signed on his behalf by his father as his guardian.
- ii. The respondent No.2, his family and other relatives have other properties in different places in Karveer Taluka. His

relatives are staying at different places in Kolhapur and outside Kolhapur. Therefore, to complete the formalities regarding those properties in Karveer Taluka, the respondent No.2 and other relatives executed a Power of Attorney in favour of the petitioner on 10.2.2000. It is the specific case of the respondent No.2 that in that document of Power of Attorney, the respondent No.2 had not given any rights in respect of the land R.S. No.14, Hissa No.13B. In spite of that, the petitioner took dishonest advantage of that Power of Attorney and caused division of the said land at village Kandalgaon bearing R.S. No.14, Hissa No.13B. This was done without the respondent No.2's permission or consent. Then the petitioner had got this particular property attached to his other land. In that behalf, no information or notice was given to the respondent No.2.

- iii. When the respondent No.2 came to know that his property was misappropriated by the petitioner, he obtained documents under the Right to Information Act.

At that time, the respondent No.2 came to know about these facts. The respondent No.2 then gave a complaint to Gokul Shirgaon police station, Kolhapur but the police did not take cognizance of his complaint and, therefore, he filed a complaint before the Judicial Magistrate, First Class, Kolhapur on 6.3.2012.

5. The in-charge Judicial Magistrate, First Class vide his order dated 15.3.2012 directed registration of FIR and investigation into the offence as per Section 156(3) of Cr.P.C. In that order, the brief allegations in the complaint were mentioned. It was also observed that it appeared that the allegations made by the respondent No.2 were well founded. The offences were serious and cognizable. The offences needed to be investigated by the police and, therefore, based on these reasons, the order was passed.

6. Pursuant to this order, FIR was lodged vide C.R. No.4/2012 at Juna Rajwada police station, Kolhapur on 19.3.2012 under Sections 406, 418, 420, 465, 468 of IPC. The investigation

was carried out and the charge-sheet was filed. The charge-sheet is annexed to this Writ Petition. The statements of the witnesses are also part of the charge-sheet besides the important documents and copies of the extracts regarding different properties. The gist of all this investigation is mentioned in the charge-sheet under the column “brief facts of the case”.

7. During investigation, the statements of the respondent No.2 and other important witnesses viz Asha Golwalkar, Jitendra Shiroadkar, Vrushali Naik etc. were recorded. Some important features of the documents in question were also mentioned in the charge-sheet. The sale deed of R.S. No.14/13B admeasuring 25 Gunthas by which both the parties became owners, did not mention exactly how much share was owned by them.

8. Asha Golwalkar, who was also a co-owner, did not have any grievance against the petitioner, as according to her, the petitioner had shown his willingness to give her share of the land. Swapna Kulkarni, Vrushali Naik, Jitendra Shiroadkar, however, supported the respondent No.2's allegations against the petitioner. The investigation revealed that vide Mutation Entry dated

4.7.2003 R.S. No.14, Hissa No.13B was shown to be divided into sub-divisions 14/13C(1) to (6). Those entries were made in form No.6. In those entries, the respondent No.2 and other three co-owners were shown to have rights in Hissa No.13C(5) admeasuring 0.14 i.e. 14 Ares. The petitioner was shown to have his rights in Hissa No.13C(3).

9. Thus, the investigation revealed that the petitioner had obtained three gunthas land from the common land of the respondent No.2, the petitioner and other co-owners causing loss of three gunthas to the respondent No.2 and other co-owners. As per the shares, he could have claimed ownership for 8 Guntha land from R.S. No.14, Hissa No.13B, but, out of that land instead of 8 Gunthas, he has obtained 11 Gunthas by taking help of the division of R.S. No.14/13B. It is alleged that in his efforts accused No.2 Jondhalekar, who was an officer in the City Survey Office, had helped him.

10. In this connection another document i.e. application for division of the land is important. That application is dated 31.3.2001 signed by the petitioner, Subhash Babu Sanpkal,

Hindurao Ramu Sankpal and also bears thumb impression of Dadu Ramu Sanpkal. In that application, request was made for dividing Survey No.14/13B and 14/13D into three parts. This document is important and significance of that document shall be discussed at appropriate place in this order.

11. The Chief Judicial Magistrate mainly observed that though the Power of Attorney did not specifically mention R.S. No.14/13B, in paragraph-12 of his order he held that the said power-of-attorney 'impliedly' authorises the petitioner to record names of the informant and other co-sharers as per their shares in property bearing R.S. No.14/13/B at Kandalgaon. Mainly based on this reasoning, the petitioner's application for discharge was allowed. This very observation was held to be improper by the learned Additional Sessions Judge in his order whereby the trial Court's order was set aside. This particular discussion is made in paragraph-11 of the Sessions Court's order.

Submissions on behalf of the petitioner :

12. Learned Senior Counsel Shri Gupte made following submissions :

- (a) The original complaint was not supported by an affidavit of the respondent No.2. The provisions of Section 154(3) of Cr.P.C. were not complied with before approaching the Magistrate's Court and, therefore, as per the ratio of the judgment of the Hon'ble Supreme Court in the case of **Priyanka Srivastava and another vs. State of Uttar Pradesh and others**¹, the complaint itself was not maintainable and, therefore, the entire further proceedings were vitiated.
- (b) He submitted that in the 7/12 extract in respect of R.S.No.14/13D, the name of the respondent No.2 is also mentioned as a co-owner. Similarly even the petitioner's name is mentioned as a co-owner. This property was held as a joint family property which includes names of the petitioner and the respondent No.2's uncle and other family members. The respondent No.2 has not suffered any loss in respect of the land.
- (c) He, then referred to the important document Power of

1 (2015) 6 SCC 287

Attorney dated 10.2.2000. He submitted that this particular Power of Attorney gives full rights to the petitioner to carry out all the procedure mentioned in the Power of Attorney. The Power of Attorney mentions that the joint-owners had properties at Kandalgaon and the petitioner was the owner of the properties in Gokul Shirgaon. After discussion it was decided to exchange the properties so that the petitioner would be owner of Kandalgaon property and the executors of the Power of Attorney i.e. co-owners of the property in Kandalgaon would become owners of the properties at Gokul Shirgaon and for that purpose the petitioner was given power to take steps to make changes in the revenue record.

- (d) He submitted that the recitals of this Power of Attorney show that the petitioner has not committed any offence by exercising his powers which he derived from that Power of Attorney. Using this particular Power of Attorney, he applied for division of the property on 31.3.2001. Even the uncle of the parties, who was head of the family in the

year 1994, had applied for measurement of the said property and the petitioner had only continued such applications and, therefore, no offence was committed by him.

- (e) Shri Gupte further submitted that the sale deed dated 24.4.1990 in respect of R.S. No.14, Hissa No.13B does not specify the area which the co-owners were entitled to, however, the sale-deed does mention the amounts paid by the five co-owners. The petitioner had paid Rs.29,450/- out of Rs.89,830/-. The respondent No.2 had paid only Rs.18,890/- and as per the provisions of Sections 37 and 44 of the Transfer of Property Act, the petitioner was entitled to his proportionate share and he was also entitled to alienate his share or deal with that share. Considering his ownership rights, there was no necessity or requirement in law for him to have taken consent from the co-owners for division of this property.
- (f) In any case it was the duty of the Government Officers to issue notices to the co-owners before effecting the division

and for that lapse, if any, the petitioner cannot be held liable.

(g) Just by making an application for such division cannot fall within the ambit of the definition of 'cheating' or 'misappropriation' or even 'criminal breach of trust'. To what exact share the co-owners are entitled to could only be decided by a Civil Court and the respondent No.2 has wrongly invoked the criminal jurisdiction.

(h) Shri Gupte then relied on the following judgments

- (i) **Yogesh @ Sachin Jagdish Joshi Vs. State of Maharashtra**²;
- (ii) **Dilawar Balu Kurane Vs. State of Maharashtra**³; and
- (iii) **P. Vijayan Vs. State of Kerala and another**⁴

to contend that if two views are equally possible and if the Judge is satisfied that the evidence produced before him gives rise some suspicion but not grave suspicion against the accused, then he will be fully justified to discharge the accused in exercising jurisdiction under Section 227 of the Code of Criminal Procedure. The Judge cannot act merely

2 (2008) 10 SCC 394

3 (2002) 2 SCC 135

4 (2010) 2 SCC 398

as a post-office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court. The Court is bound to decide whether there is sufficient ground to proceed against the accused.

Submissions on behalf of the respondent No.2 :

13. Shri Dhond, learned Senior Counsel appearing for the respondent No.2 made following submissions :

- (a) He submitted that the petitioner has not informed the Court that the order passed under Section 156(3) of Cr.P.C. was upheld by the Additional Sessions Judge vide his order dated 21.6.2014. This order was passed in Criminal Revision Application No.113/2012 preferred by the petitioner herein. The fact of dismissal of this revision was not brought to the notice of this Court. He submitted that said order was passed on 21.6.2014 and it was not challenged further. Thus, it had attained finality and, therefore, it was not open for the petitioner now to canvass that the order under Section 156(3) of Cr.P.C. suffered

from any infirmity.

- (b) Shri Dhond relied on the judgment of the Hon'ble Supreme Court in the case of **State by the Inspector of Police, Chennai Vs. S. Selvi and another**⁵ that explained the scope of the power to discharge the accused. It was observed in that judgment in paragraph-10 as follows :

“10. If on the basis of the material on record, the Court would form prima facie opinion that the accused might have committed the offence, it can frame charge, though for conviction it is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of charges, the probative value of the material on record has to be gone into and the Court is not expected to go deep into the matter and hold that the materials would not warrant conviction. The Court is required to evaluate the material on record at the stage of Sections 227 or 239 of the Code, as the case may be, only with a view to find out if the facts emerging therefrom taken at the face value discloses the existence of all the ingredients constituting the alleged offence. It is trite that at the stage of consideration of an application for discharge, the Court has to proceed with the presumption that materials brought on record by the prosecution are true and evaluate such material with a view to find out whether the facts emerging therefrom

5 (2018) 13 SCC 455

taken at their face value disclose existence of the ingredients of the offence.”

He submitted that in this particular case not only a *prima facie* case was made out, but as per this ratio there is a presumption that the materials brought on record are true.

- (c) On merits of the matter, he submitted that the petitioner has basically mixed-up two issues deliberately. The property i.e. R.S. No.14/13B admeasuring 25 Ares was purchased in the year 1990 and it had five owners including the petitioner and the respondent No.2, whereas the property i.e. R.S. No.14/13D had 27 owners and it was purchased in 1993. Those two properties are separate and their owners are different. The petitioner had very cleverly in his application before the Revenue Authorities had projected himself to be holder of Power of Attorney in respect of both the properties whereas his power was restricted only to the property R.S. No.14/13D. The co-owners of R.S. No.14/13B had not given him any authority

to effect any partition or deal with that property. The application dated 31.3.2001 does not disclose that other co-owners of R.S. No.14/13B had not consented to any such division.

- (d) He submitted that as per his share in R.S. No.14/13B, he was entitled to only 8 Ares of the land but he had taken 11 Ares thus causing loss of 3 Ares. He had used that property to consolidate his other land which was adjoining to these properties. Thus he had obtained dishonest financial gain to a much higher value than he was actually entitled to. He has also caused loss to the respondent No.2 and other co-owners. He, therefore, submitted that all the ingredients of the offences are clearly made out and, therefore, there was no scope to hold that the petitioner was entitled for discharge from the case. The reasoning of the Sessions Court is proper and it cannot be interfered with.

Reasons and conclusions :

14. I have considered these submissions. As is laid-down by the Hon'ble Supreme Court, the scope for consideration of

discharge of an accused is well formulated. If the allegations give rise to suspicion but not grave suspicion the Court can discharge the accused but in the process the Court is not required to make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. As held in the case of **S. Selvi** (supra), the Court will have to find out if the facts emerging from the material, at the face value, disclose the existence of all the ingredients constituting the alleged offence. The Court has to proceed with the presumption that the material brought on record by the prosecution are true and evaluate such material with a view to find out whether the facts emerging therefrom taken at their face value disclose existence of the ingredients of the offence. Based on these guidelines, I am considering this Writ Petition.

15. As far as the challenge to the order under Section 156(3) of Cr.P.C. is concerned, that issue stood concluded long back in the year 2014 itself and that order was not challenged by the petitioner further. It had attained finality. After that the investigation was completed. Charge-sheet was filed. The

discharge application was decided. Even Revision Application was decided. In none of these proceedings, this point was raised. Therefore, at this late stage, the petitioner cannot contend that the order passed under Section 156(3) of Cr.P.C. suffers from any infirmity. Moreover now that the investigation is carried out and since there is material against the petitioner that material will have to be tested on merits.

16. The basic feature of this case depends on the Power of Attorney in question. As mentioned earlier, it was executed on 10.2.2000 by 27 co-owners of R.S. No.14, Hissa No.13D admeasuring 1 Hectare 32 Ares situate at village Kandalgaon, Taluka-Karveer, District-Kolhapur; out of which the subject matter of the Power of Attorney was 1 Hectare 23.75 Ares. The recital is specific and it is restricted to R.S. no.14, Hissa No.13D. It makes no reference to R.S. No.14, Hissa No.13B. Except for the petitioner and the respondent No.2 the owners of these properties are different. The description of the property is interesting. It describes the other properties which are surrounding R.S. No.14, Hissa No.13D. Out of which, on the South there is a property of

R.S. No.14, Hissa No.13B owned by Ramu Ganu Sankpal, on the North also there is a land owned by Ramu Ganu Sankpal and the petitioner jointly, and on the West there is a land of Subhash Babu Sankpal. The names of these owners of the adjoining surrounding lands are important because the application in question bear signatures of Subhas Babu Sankpal and sons of Ramu Sankpal. Thus, it is clear that R.S. No.14, Hissa No.13B is a large piece of land. Some portion is co-owned by the petitioner, the respondent No.2 and three other co-owners who had purchased that portion in the year 1990 vide sale deed dated 24.4.1990. The area owned by these people was 25 Ares. What the application dated 31.3.2001 made to the City Survey Office projects is that all the signatories of that application i.e. the petitioner, Subhash Babu Sankpal, Hindurao Ramu Sankpal and Dadu Ramu Sankpal are the co-owners of R.S. No.14/13B and R.S. No.14/13D. The petitioner has described himself as the Power of Attorney Holder of the 26 co-owners. His Power of Attorney was in respect of R.S. No.14/13D. The other signatories were part co-owners of R.S. No.14/13B. Thus, the other co-owners of the portion of the land

i.e. R.S. No.14/13B i.e. the respondent No.2, Swapna Kulkarni, K. Madhavrao and Asha Golwalkar had not consented for any such division; and yet, false representation was made that the petitioner and other signatories to that application had full rights to seek division of those properties. The request in that application was for dividing those two lands into three parts. There was no separate request for two different lands i.e. R.S. No.14/13B and 14/13D. Using this particular application ultimately the land i.e. R.S. No.14/13B was divided and the petitioner gained unfair advantage for himself to the extent of 3 gunthas land, as is reflected from the investigation.

17. Thus, *prima facie* there is a strong case against the petitioner. It is not merely a civil dispute. The investigation based on all these documents does reveal a definite intention and execution of offence on the part of the petitioner at least *prima facie*. Therefore, the trial is required to proceed further. The petitioner can explain all these allegations only during trial. At this stage, there is sufficient material against him *prima facie* requiring the Court to frame charges against him for the offences

mentioned hereinabove. In this view of the matter, there is no infirmity in the order passed by the Sessions Court in Revision Application. Consequently the Writ Petition is dismissed. It is clarified that these observations are *prima facie* in nature, the trial Court shall decide the trial in accordance with law.

(SARANG V. KOTWAL, J.)

Deshmane (PS)